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No. 577

In the

Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH PAUL GLIMCO and
LENA GLIMCO,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Joseph P. Glimco and Lena Glimco, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Tax Court of the United States entered on July 20, 1967.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. A., p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on June 19, 1968 (App. B, p. App. 7a). A timely petition for rehearing was denied on July 9, 1968 (App. C, p. App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

STATUTE INVOLVED

26 U.S.C., (1964 Ed.), Section 162:

> Trade or business expenses.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that the Hobbs Act indictment returned against a Teamster Union official did not arise in connection with his profit seeking activities?

2. Is cash-in-hand the only measure of "profit-seeking activities" as defined in *United States* v. *Gilmore* (372 U.S. 39):

> "The principle we derive from these cases is that the characterization, as 'business' or 'personal', of the litigation costs of resisting a claim depends on whether or not the claim arises in connection with the taxpayer's profit seeking activities"

and, if there is no immediate, demonstrable "cash-in-hand", is the expense automatically "personal" rather than "business"?

3. Is there "Equal Justice under Law" when under the Criminal Justice Act attorneys' fees are paid on

behalf of indigent persons without any claim by the Internal Revenue Service that such sums are income to indigents, when in the case at bar where a financially able labor union paid the attorney's fees for one of its officers charged with a Hobbs Act violation, said amounts are assessed as additional income on which a fraud penalty was asserted?

4. Will the Courts impose an additional tax penalty on financially able defendants by refusing a deduction in such cases, particularly in the light of *Johnson* v. *Zerbst*, 304 U.S. 458; *Gideon* v. *Wainwright*, 372 U.S. 335; and more particularly the Criminal Justice Act. (18 U.S.C. 3006(a))

STATEMENT OF THE CASE

In the Tax Court, the Petitioner Joseph P. Glimco filed a petition for a redetermination of deficiencies asserted by the Commissioner of Internal Revenue for the taxable years 1954 through 1957.[1] On the three issues involved, the Tax Court decided in favor of the Commissioner. Those issues were (1) do the legal fees and expenses, totaling approximately $125,000, paid by Teamsters Local 777 to defend Taxpayer in a Hobbs Act prosecution, constitute income to Petitioner or are they deductible as ordinary and necessary business expenses; (2) whether his cost basis for real property at 1215 North Oak Park Avenue, Oak Park, Illinois, was overstated; and (3) whether certain dividends were taxable to him or his children.

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[1] Petitioner's wife, Lena Glimco, is also a party but only by virtue of filing joint returns with her husband during the taxable years in question.

The United States Court of Appeals for the Seventh Circuit affirmed the Tax Court decision. Petitioner, however, seeks review in this Court only as to legal fees and expenses.

The petitioner contended that the expenditure of said sums was a union expense or a gift which was authorized and ratified by the general union membership pursuant to resolution. But more than this, the petitioner contended that in the event the amounts were deemed to constitute income to him, then he was entitled to a deduction from his gross income of said amounts as ordinary and necessary expense paid or incurred, during the years involved, in the carrying on of petitioner's trade or business.

The first witness for the petitioner was Frank J. McGarr, (R. 39), who testified that he has been an attorney admitted to practice in the State of Illinois, since 1950. From 1954 to 1958 he was, for the first three years, Chief of the Criminal Division of the U.S. Attorneys office and thereafter First Assistant United States Attorney. The witness also testified that he has been on the faculty of Loyola University School of Law, teaching the subjects of criminal law and admiralty law. McGarr testified that he was the prosecutor in the case entitled *United States of America* v. *Joseph Paul Glimco.* He identified a record, Petitioner's Exhibit 10, as being the trial transcript of testimony in that case.

McGarr testified that at the time of the presentation of the Government's case that Mr. Glimco was employed by Local 777. McGarr was specifically asked whether his presentation of the case against him extended beyond his position in the Taxi Cab Local. McGarr answered that it did. (R. 42). He testified: "It was the Government's theory in that case that Mr. Glimco's position and influence in the Teamsters Union enabled him to dominate the

transportation situation on the poultry market with regard to several locals that were involved in transportation such as—a few locals such as for example Egg-handlers". It included, according to Mr. McGarr; Local 703, the commission drivers who were the market drivers; Local 705, the truck drivers and platform workers; Local 710 the over-the-road haulers of dressed birds; and Local 731, the union that handles the scavengers.

The witness testified that not only was the petitioner an official of the Taxi Cab Drivers Union, but that he was a member of the Joint Council of Teamsters. McGarr testified that the Joint Council is a policy-making council of Teamsters Unions made up of the heads of the various locals involved. His information was derived from voluminous reports of the Federal Bureau of Investigation and the Grand Jury testimony.

The next witness on behalf of the petitioner was Joseph Coca. Joseph Coca testified that he was an officer of Teamsters Local 777 until July 1, 1965, when he retired. On October 4, 1954, he was present at a meeting of Local 777 at 1213 Blue Island Avenue. (R. 44) On that evening, as President of the local, he testified that the meeting was opened at 8:00 o'clock and "due to the fact of the bad press relations that we were getting from various newspapers and throughout the country against the labor movement," a motion was brought before the membership that if any one of its officers or members was brought to Court, the local would pay the legal expenses of fighting these issues. Mr. Coca said "this is in regards to the officers and the members, that the local would stand behind the individual as a gift for the money to protect that". (*sic*) (R. 45)

The minutes of the meeting were in evidence as Joint Exhibit 6F. (R. 82) The witness testified that so far

as he was concerned being present there and having the flavor of the meeting and everything else that the expenditure of these monies was *a gift by the union* to anyone in difficulty with the law as a result of the anti-labor wave of newspaper publicity.

The next witness who testified was the petitioner, Joseph Paul Glimco, who stated that he was presently the President of Local 777 of the International Brotherhood of Teamsters; that he is 57 years of age and has been in the labor movement for approximately 30 years. (R. 51) The petitioner testified that his first connection with organized labor was as a chauffeur for William J. Hanley, who was Secretary and Treasurer of Local 703 of the International Brotherhood of Teamsters. This Local's jurisdiction covered everything on the market as far as trucking was concerned, including inside help, produce houses and poultry houses. The "market" was described by the petitioner as the South Water Street Market, Fulton Street Market, Randolph Street Market, and the Market at 78th Street and State Street in Chicago, Illinois. The "market" as described by the petitioner was produce, fruits, vegetables, poultry, fish, which arrived principally in trucks. Materials would come in from the farms by truck and were purchased and delivered to various grocery stores in Chicago, Illinois.

The petitioner testified that he was the chauffeur for Mr. Hanley a number of years until he accepted a position with the Poultry Handlers Union on the Fulton Street Market. At the time he knew Hanley, Hanley was the "boss of the market." (R. 52) Hanley's union was the principal union that moved most of the commodities on the market. While the petitioner was on leave as a chauffeur from Mr. Hanley, he accepted a position with

the Poultry Handlers Union, Local 650, Meat-cutters affiliate of the AFL-CIO union. After leaving the Poultry Handlers, he became associated with Local 777, International Brotherhood of Teamsters. He was also a member of Local 703 until he went with Local 777 in 1937. The Charter of Local 777 was secured by Mr. Hanley and the petitioner.

"After we secured a Charter in the Teamsters for them, Mr. Hanley suggested that I go over and help the new union administer their affairs. I spent a good part of the morning at Local 777 and from there I would go over on to the market where we met in a restaurant at Fulton and Aberdeen, on the southeast corner." The petitioner testified that he would meet various labor persons from all around the city and various employers on the market. At the time he was an assistant business agent with Local 777, and later became a trustee. After he became a trustee, he then became a member of the Joint Teamsters Council No. 25. This was around 1944. During the period covered by the indictment, 1944 to 1954, to the best of the petitioner's recollection he was a trustee of Local 777 and a member of the Joint Teamsters Council No. 25.

As a trustee in one of the affiliate locals, such as 777, he had a voice, as a delegate to the Joint Council, in the policy making of the Council, which is composed of all of the Teamster locals in the city of Chicago. At that time there were approximately 42 or 43 Locals including Local 703, who were the commission drivers on the market. He knew John T. O'Brien, also known as Sandy O'Brien, who was not only head of Local 710, but a Vice President of the International Brotherhood of Teamsters in charge of the central states area of approximately 15 or 16 states. He was acquainted with the officials of

Locals 752, 727, 731, 738, 781, all of whom were active on the markets. (R. 55-56)

The petitioner testified that in connection with the employers who were named in the indictment, he was well acquainted with the M. Zimmerman Co. who conferred with him about labor matters. The petitioner consulted with Meyer Litman about labor matters for 20 or 30 years. He knew the A. F. Merman & Co. house and had many conversations with them on the market regarding labor matters. He was familiar with the family and brothers of Karston & Son and conferred quite frequently with them about labor matters during the period of the indictment. He knew the Cubel Produce Co. He knew the J. H. Hoar & Co. He also knew the Richter & Sons Co. and had conversations with them regarding labor matters. (R. 58-60) He was also familiar with the American Poultry Company, a sole proprietorship; knew a man by the name of Morris Merker; knew also O. G. Shice Co.; Edgar Friedheim, and Maurice Brothers Co., all of whom were witnesses in the criminal case. (R. 60)

All of the foregoing witnesses in the criminal case were in business on the market in produce of various kinds.

Mr. Hanley died in September of 1944 and the petitioner Glimco inherited his responsibility and position on the market. (R. 61) He was consulted by unions and employers not only about conduct on the market, but affairs around the city.

The next witness who testified for the petitioner was Barnabas Sears, who testified that he was admitted to practice law in Illinois on October 14, 1926. He was President of the Illinois State Bar Association for one year and presently the Illinois State delegate to the

American Bar Association. He is past regent of the American College of Trial Lawyers, and one of the organizers and past chairman of the Labor Relations Section of the American Bar Association and the Illinois Bar Association. (R. 73) He also held positions in other Bar Sections and activities. He was Chairman of the Joint Committee on the Judicial Article of the Chicago Bar Association and the State Bar Association for seven years that formulated, in substance, the present new Judicial Article in this State of Illinois. (R. 73)

Mr. Sears said he knew Joseph Glimco and represented him in the case of *United States* v. *Joseph Glimco* tried in the United States District Court for the Northern District of Illinois. During the course of representing him, he personally interviewed witnesses, including the employer witnesses.

At this point, the Tax Court asked the following question: (R. 74)

> "The Court: I don't understand that there is any contention in this case from the pleadings with respect to the reasonableness of the amounts paid as attorney's fees and expenses, is there?
> "Mr. Young: The amount?
> "The Court: Yes.
> "Mr. Young: *No, Your Honor.*"

Thereafter, the following questions and answers were made:

> "Q. Now, Mr. Sears, what was the origin of the facts and the character of the activities of Mr. Glimco that constituted the basis of your defense of the Government's case against him?
> "A. Well, the case originated in the activities of Mr. Glimco as a labor leader on the Fulton fish market here in Chicago." (R. 75)

* * *

"The Witness: Well, if I understand the question rightly, your Honor, I can only answer it by saying that my investigation disclosed that the case originated in the activities of Mr. Glimco as a labor leader on the Fulton fish market.

"Mr. Young: I would object to that, your Honor. This is the results. This is not the facts. This is the result.

"The Court: I am taking them as the basis of this witness as to the facts. They are the basis. I take it as the form and substance of his defense of this man. I don't receive the results of his investigation as proof of the fact which he enunciates as a result.

"By Mr. Calihan:

"Q. In your defense of the case against Mr. Glimco did it extend beyond his position in the taxicab local?

"A. Yes, sir.

"Q. In what respect?

"A. Well, in this respect: he was the successor to Mr. Hanley, who was the labor boss, if I may use the term, of the Fulton fish market, and it was claimed that in his capacity as a labor leader, he committed the acts complained of in the indictment.

"Q. Now, were you paid by the local union?

"A. Yes, sir." (R. 76)

* * *

"Q. What were the facts on which you based your acceptance of these fees?

"A. Well, if I may answer your question this way, Mr. Calihan. I had prior to the time I defended Mr. Glimco a fair amount of experience in the labor field. I don't know that that's responsive to your question; and if permitted, I will continue to explain what that was.

"Q. Go ahead.

"A. Well, up to the time I undertook—

"Mr. Young: I will object to this, Your Honor. I still think it is immaterial and irrelevant as to the payment from the union to Mr. Sears as to the issues here.

"The Court: I think it is extremely relevant and material.

"You may answer particularly on the position taken by the respondent in this case.

"The Witness: Well, I had represented employers in labor disputes up to this period in 1957, and from that experience and dealing with labor representations I was completely aware of the fact that you cannot compartmentalize the activities of a labor man. You cannot, for example, say that Mr. Glimco's sole activities as a labor man relate solely to his particular office then he then held in Local 777, because the first labor case I was in back in 1939 I learned that the activities of a labor leader extend far beyond the particular duties of his particular office, and speaking solely about his activities there—

"The Court: Just a minute. The answer being given is far afield of the question asked. The answer given amounts to an offer of expert opinion as to one of the several determinations to be made by this Court. They are of necessity hearsay.

"This answer is not responsive at all to your question.

"By Mr. Calihan:

"Q. Mr. Sears, knowing the question and in view of the Court's ruling, would you state to me what the fact determinations were that you made in connection with your acceptance of these fees?

"A. Well, the fact of the matter was that the union had a real interest in defending—

"Mr. Young: I object to that, your Honor. This is a conclusion and opinion as to what the union had an interest in.

"The Court: Now, he may testify to facts which he believed to be facts, whether they are or not, which influenced him to accept an attorney fee in this case from someone other than the one indicted.

"Proceed.

"The Witness: May I have the question and answer read up to the point of the objection?

"(Record read)

"The Witness: Its officer on charges that I considered basis which grew out of its activities generally as a labor leader.

"Mr. Calihan: No further questions.

"The Court: Cross-examination.

"Cross-Examination by Mr. Young.

"Q. Mr. Sears, what was Mr. Witt Hanley's position in the Fulton Street market?

"A. I didn't get that. The poultry market?

"Q. Mr. Hanley's position in the poultry market.

"A. Well, my investigation disclosed that he was the boss of the—

"Q. What do you mean by 'boss'? Was he a president of the local, or what?

"A. He was the gentleman that controlled labor relations in the Fulton fish market.

"Q. Do you know whether he was a union member?

"A. Well, I never met Mr. Hanley because he was dead at the time, but my investigation disclosed that he was a member of some Teamster Union, as I recall it.

"Q. And you say Mr. Glimco, being his successor, took over this position with that Teamster local?

"A. No, no, I didn't say that. I said he took over Mr. Hanley's general position as the so-called labor boss of the Fulton fish market.

"Q. As a boss?

"A. Well, that's what I understood it.

"Q. Did you ever represent a labor union prior to this case or a labor union official prior to this criminal case?

"A. No, sir.

"Mr. Young: That's all I have, your Honor.

"The Court: Any redirect examination?

"Mr. Calihan: No, sir." (R. 79)

Thereafter no further witnesses being offered on behalf of the respondent, the following colloquy occurred:

"Mr. Calihan: Your Honor, at this time I would like to call the Court's attention to something. Perhaps counsel for the respondent will so stipulate, but it relates to whether or not I should make this statement in the record or the Court will take judicial notice of the record in another case docketed in this court, No. 94551.

"Mr. Young: I would not so stipulate and vigorously oppose it.

"Mr. Calihan: Well, I would like to at least represent to the Court that the records of this court in Docket No. 94551 will show notice of deficiency having been sent by the respondent to the Taxicab Drivers Local 777, International Brotherhood of Teamsters, alleging that the payment of these legal fees which are in question here by the said union were improper payments by the union and that the said case was settled on the basis that the tax returns filed by the said local were proper and that on January 13, 1966, a decision of this court was entered finding no deficiency.

"The Court: I, of course, take judicial notice of any of the files and records of this court, but the facts you are seeking to get into the record are totally irrelevant, immaterial to any issue in this case.

"I take it that your contention is that the Commissioner is estopped in some way by taking an inconsistent position.

"Mr. Calihan: Not estopped, your Honor. I merely want to demonstrate by this particular piece of evidence before the Court that at least so far as the union was concerned, that it was a proper deduction.

"The Court: I don't see as it would make any difference at all whether it was a proper deduction in some other case.

"I will take judicial notice of any of the files and records of this court.

"Mr. Young: Your Honor, by 'files of the court,' does your Honor mean pleadings, and things of that nature?

"The Court: Yes.

"Mr. Young: You will take judicial notice of them?

"The Court: Yes, I will.

"Mr. Calihan: On that basis the petitioner rests.

"The Court: *Do you have testimony to offer for the respondent?*

"Mr. Young: *No, your Honor.*

"The Court: *You rest at this point?*"

"Mr. Young: *Respondent rests.*" (R. 79-81)

(Emphasis supplied)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with applicable decisions of this Court, in *United States* v. *Gilmore,* 372 U.S. 39 and *Commissioner of Internal Revenue* v. *Walter F. Tellier, et ux.,* 383 U.S. 687.

2. This Court should exercise its jurisdiction to decide an important question of Federal law, which has not been, but should be decided by this Court. Does not the teaching of *Johnson* v. *Zerbst,* 304 U.S. 458, *Gideon* v. *Wainwright,* 372 U.S. 335 and the Criminal Justice Act compel the conclusion that the Courts may not impose an additional penalty on financially able defendants accused of crimes by refusing a tax deduction for their defense.

1.

The Court of Appeals for the Seventh Circuit has stated in its opinion that the taxpayer's activities giving rise to legal expenses must be in connection with his "trade or business" within the meaning of Section 162(a) of the Internal Revenue Code (26 U.S.C., Paragraph 162(a)). The Court says, "That provision must be narrowly construed," and quotes from *U.S.* v. *Gilmore* (372 U.S. 39). In the *Gilmore* case, as this Court stated, (at p. 46):

> "The pivotal issue in this case then becomes: was this part of respondent's litigation costs a 'business' rather than a 'personal' or 'family' expense?" *United States* v. *Gilmore,* 372 U.S. 39, 46.

The Supreme Court then declared:

> "It is the origin of the liability out of which the expense accrues or the kind of transaction out of which the obligation arose which is crucial and controlling."

In the *Gilmore* case, this Court said that expenditures made in connection with a marital litigation could hardly be deemed expenses incurred in the carrying on of a trade or business. And so it is with most of the cases on this subject. There is a clear line of demarcation between what is business and what is personal. In the case at bar, however, the taxpayer's activities as a labor leader on the poultry market were clearly not personal, neither marital nor extra-curricular. They were inextricably tied in with his activities as an official of Local 777. It was his office in Local 777 and the preëminence he enjoyed in the labor movement that gave rise to his activities on the poultry market. All evidence of his market activities were in the area of labor dispute, wage-hour, and other related union-employer relations. Clearly they were not personal. These activities were all of a business nature.

The narrow construction which the *Gilmore* case speaks of, must be equated with what the Supreme Court said at page 44 of its opinion.

> "For income tax purposes, Congress has seen fit to regard an individual as having two personalities: 'one is (as) a seeker after profit who can deduct the expenses incurred in that search; the other is (as) a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures.'" *United States* v. *Gilmore*, 372 U.S. 39, 44.

For the Court of Appeals to say that the taxpayer's activities in the afternoon in no way bore relation to his profit activities is to ignore reality. The criminal charges against the taxpayer found their source in his business activities as a labor leader, and none other. The Courts below have failed to even suggest the criminal defense

arose from his "human or family needs." This case falls squarely within *Commissioner* v. *Tellier,* 383 U.S. 687.

The charge which was leveled against the petitioner carried a sentence of 20 years. The Landrum-Griffin Act further provides that upon conviction of such an offense the person so convicted cannot hold union office for a period of five years. While this provision was passed subsequent to the offense charged, if the taxpayer had been convicted, the passage of the Landrum-Griffin Bill would have barred him from holding office for a period of five years at the conclusion of his sentence. The Landrum-Griffin Act was retrospective in application; and most certainly reflects an understanding by Congress of the business nature of the charged activities. How could his human or family needs lead to congressionally restricted employment?

In the case below, petitioner pointed out to the United States Court of Appeals for the Seventh Circuit that the Tax Court in Docket No. 94551 permitted Local 777 to retain its exempt status under Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. 501(c)(5)). Under that settlement, Local 777 was allowed to take certain deductions in 1956 and 1957, including the legal fees and expenses paid to the petitioner's counsel for the defense of the Hobbs Act case.

The Court of Appeals apparently misunderstood the purpose of the petitioner in referring to the settlement by the Respondent Commissioner of Internal Revenue of the proceedings against Local 777. The Petitioner did not urge that such a settlement "created estoppel". The argument was advanced to demonstrate the complete and utter inconsistency of the positions taken by the Respondent below. In the case of the taxpayer Glimco the legal

fees were ruled not an ordinary and necessary business expense. In the case of Local 777, the same legal fees were conceded to be proper deductions and *allowed* as ordinary and necessary business expense to the union. How the donor of these funds can be held to have properly deducted them as a business expense and the donee held to have improperly failed to report them as additional income, is not explained by either the Commissioner or the Court below.

The positions taken are flatly contradictory, and beyond explanation. It is somewhat akin to saying that a sum of money given as a bribe is not a bribe to the bribor, but it is a bribe to the bribee.

The Court of Appeals said that the basis for holding that the deduction was a proper union deduction was that a *Teamster Union* was concerned that its "image might be tarnished". There is nothing in the record to support that. The record *does* disclose, however, the union was concerned that due to the wave of publicity and the anti-union feeling engendered by the press and by prosecutive authorities, that its members or its officers might be subject to attack. The union, by a vote of the membership, authorized the payment of legal expenses in the event *either a member or an officer* became a casualty of such anti-union feeling. The "not guilty" verdict is itself tribute to consummation of this aim.

The true concern was for the welfare of its officers and members. The publicity which the Teamsters have received in the last decade or so could scarcely support a concern for a tarnished image.

With all due respect to the Court of Appeals for the Seventh Circuit, it is respectfully suggested that the opinion of the case at bar is flatly contrary to this Court's

decisions in *Gilmore* and *Tellier* (supra). At least, it offends the spirit of the words "origin of liability" used by this Court in its *Gilmore* decision. This Court should grant the petition for Writ of Certiorari to the Seventh Circuit because the opinion below is in conflict with two decisions of this Court.

2.

It was urged below that the Courts should not impose an additional penalty on financially able defendants charged with crime who come into the district courts to defend themselves against federal criminal charges. In *Tellier* v. *Commissioner,* the United States Court of Appeals for the Second Circuit found for the taxpayer, 342 F.2d 690. Their decision was affirmed by the Supreme Court. In said case, the issue of deductibility was before the Second Circuit sitting en banc. In a special concurring opinion, Chief Judge Lumbard with whom Waterman and Kaufman, Circuit Judges, joined, posed another problem which presents itself if legal expenses, under the circumstances here, are to be regarded as taxable income. That Court said as follows (page 696):

> "In 1938 the Supreme Court held in *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, that counsel must be furnished an accused who is financially unable to retain his own counsel to defend him on federal charges. A few months ago Congress at long last realized that the right to counsel has little substance unless counsel is paid for his efforts and reimbursed for necessary expenses. Under the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, which became law on August 20, 1964, a defendant who is found to be financially unable to provide counsel and defray defense expenses is now entitled to have such reasonable and necessary expenses paid by the government up to specified maximum amounts.

"The assignment and compensation of counsel under the Criminal Justice Act do not depend on whether a defendant successfully asserts his innocence. Indeed, almost all of counsel's labors ordinarily must be done and his expenses must be incurred before guilt or innocence is finally established. The defendant has the right to put the government to its proof, if he so elects. His right to counsel does not depend upon whether in fact he has a defense or whether it was reasonable to contest the charges. Surely it needs no argument to support the proposition that unless a defendant has the benefit of counsel who can give necessary attention to the charges and their defense—and in cases such as Tellier's, this is usually a considerable task for conscientious counsel—he may not be in a position to make an intelligent and knowing decision as to whether or how to conduct a defense. Moreover, whether he stands trial or pleads guilty, he needs counsel who has thoroughly familiarized himself with the case and who can plead for his client in the light of such knowledge. If the compensation of counsel under the Criminal Justice Act does not depend on the success of the defense, it would seem to follow that the allowance of the deduction should not depend on the outcome in cases where the defendant is able to and does assume the financial burden of defending against criminal charges.

"In holding that a financially able defendant may deduct as 'ordinary and necessary' expenses the legal fees and expenses incurred in an unsuccessful defense, we are being consistent with a clearly evinced policy that a defendant be represented by counsel regardless of the ultimate success or failure of his defense.

"As there is no provision of the tax laws which requires a contrary result, *I agree that we should not impose an additional penalty on financially able defendants by refusing a deduction in such cases.*

> The allowance of the deduction here sought is consonant with public policy and ought to be allowed. I think the teaching of *Johnson* v. *Zerbst, supra, Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and the Criminal Justice Act requires this result and that we are no longer bound by Burroughs." *Tellier* v. *Commissioner,* 342 F.2d 690. (Emphasis supplied)

If a person is indigent and is furnished counsel then counsel is compensated under the Criminal Justice Act. It would seem then that if a person has no money, he not only receives income but his income is tax exempt. On the other hand, a person who can afford counsel, or a person whose counsel is furnished him, as in the case at bar by a financially solvent union, is taxed to the extent that the same legal expense is considered additional income. The result is obviously contrary to Anglo-American principle of jurisprudence "Equal Justice Under Law", and equal applicability of the law. If Glimco had come before the District Court under the Criminal Justice Act, would expenditures paid in his behalf have been taxable to him as additional income? Certainly not. The import of this Court's decision is contrary to that great principle. An accused *must* not be penalized merely for his ability to pay. No other conclusion than that it is here can be drawn from the decision below.

It is respectfully urged that this Court should exercise its jurisdiction to decide this important question of Federal law. There would seem to be no compelling reason why a person accused of crime under our Federal system should be penalized for his ability to pay attorney's fees. Such a concept does not appear to be consistent with "equal justice under law". The very reasons

which ultimately compelled this Court to take the view it has toward an indigent defendant, should compel the conclusion that a financially able defendant should be no worse off merely because of his ability to pay for his defense. This case presents the important question of whether financial penalty can be imposed on the basis of the Government's wrongful accusation, as determined by petitioner's peers. That question should be decided by this Court.

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner herein respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Attorney for the Petitioner